Brigham Young University Prelaw Review

Volume 34 Article 15

4-2020

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Christopher Steele and Brendan Leveron were employees at a private maintenance company named Pinnacle. Both Steele and Leveron reported that Pinnacle allegedly forced them to work overtime without just compensation—an allegation that, if proven valid, would violate the Fair Labor Standards Act and California state law. They also claimed that Pinnacle was guilty of unfair business practices, retaliation and whistleblowing violations, and a failure to account. Soon after Steele and Leveron filed these allegations, they discovered that their predicament was not unique across the firm. In 2012, they decided to represent their fellow employees in a class-action suit which so that they could share the costs of hiring a lawyer, paying court fees, and gathering evidence.[2] As part of their hiring process, though, Pinnacle had forced their employees to sign agreements to binding individual arbitration. Because these contracts were already in place by the time Steele and Leveron's case reached the courts, the court dismissed the case and compelled all Pinnacle employees to settle their cases in arbitration. Without the opportunity to participate in a class-action suit, each employee would need to provide for all costs associated with the lawsuit and surrender their fate to the

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2 Steele v. American Mortg. Management Services, 2012 WL 5349511 (E.D. Cal. Oct. 24, 2012).

decision of only one arbitrator or panel with no option of appeal. In addition to this, they would forfeit their opportunity to represent and assist hundreds of fellow employees who found themselves without the means of pursuing litigation.

Similar situations are occurring across the nation as businesses and large corporations increasingly utilize the Federal Arbitration Act (the "FAA")[3] to prevent class action suits. Currently, the number of cases directly affected is in the tens of millions.[4] The issue centers on the legal system prioritizing the enforcement of questionable contract provisions over employees' constitutional right to sue within their financial ability. Most recently, the Supreme Court of the United States overturned the Supreme Court of California's decision in *Epic Systems Corp. v. Lewis* and ruled that class action waivers were enforceable under the Federal Arbitration Act.[5] Because this ruling essentially allows employers to use the Federal Arbitration Act as a loophole through which they may prevent their employees from seeking redress, it reveals the more specific ethical and legal underpinnings of this nation's jurisprudence.

This article examines the recent decision made by the Supreme Court of the United States in *Epic Systems Corp. v. Lewis* regarding the unconscionability of class action waivers in employment law under the FAA and the NLRA and explores the implications of public policy and business decisions. By weighing these contradictions in the legal system, this article advances the claim that either the judicial court system must overturn the recent decision, or the legislature ought to realign the goals of the Federal Arbitration Act with those of the National Labor Relations Act (the "NLRA") and enact an amendment to the FAA, expressly deeming class action waivers in arbitration agreements as unenforceable.

Section I of this article explains the background and history on the Federal Arbitration Act. Section II examines the potential conflict

3 Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012).

4 Adam Liptak, *Supreme Court Divided on Arbitration for Workplace Cases*, N.Y. TIMES, Oct. 2, 2017, https://www.nytimes.com/2017/10/02/us/politics/supreme-court-workplace-arbitration.html.

5 Epic Systems Corp. v. Lewis, 138 S. Ct., 1612 (2018).

between the purposes of the Federal Arbitration Act and class action suits in employment law. Section III explores the current discourse regarding the conflict between the Federal Arbitration Act and the National Labor Relations Act in the context of the recent court ruling in *Epic Systems Corp. v. Lewis*. Section IV explicates the potential consequences of this article's claim.

I. What is the Federal Arbitration Act?[6]

Essentially, the Federal Arbitration Act provides that contract clauses requiring arbitration between parties must be upheld. As a method of dispute resolution, arbitration is a low-cost and time-efficient alternative to judicial litigation that also benefits more parties. The Federal Arbitration Act capitalizes on this benefit.

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[7]

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6 Prior to the Industrial Revolution, judges and magistrates in the United States viewed arbitration with hostility. The forthcoming industrial boom brought with it an overwhelming quantity of lawsuits, making it difficult for U. S. courts to address all of the cases in their queues. To streamline the judicial process, President Calvin Coolidge signed the United States Arbitration Act (the "Federal Arbitration Act" or "FAA") into law, which "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

7 *See*, Federal Arbitration Act, 9 U.S.C. § 2.

In 2001, the Federal Arbitration Act's application to specifically employment contracts first came under scrutiny. Section 1 of the FAA provides that:

> ..."commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.[8]

In 2001, the Supreme Court clarified the application of this section in *Circuit City Stores, Inc. v. Adams*, ruling that employment contracts that included arbitration agreements were not exempt from the FAA. In the opinion, the Court further interpreted Section 1 of the FAA to apply more narrowly to employment contracts with seamen, railroad employees, and other transportation employees. To exclude all employment contracts from the scope of the FAA would "[fail] to give independent effects to the statute's enumeration of the specific categories of workers which precedes it."[9] Under this reasoning, arbitration agreements in employment contracts that exist outside of the enumerated industries in Section 1 are now fully enforceable by law.

II. The Federal Arbitration Act v. Class Action Suits

By understanding the historical application of the Federal Arbitration Act and class action suits in employment law, we can better see that the two share the same overarching purpose—to streamline the judicial process and decrease costs of litigation. The only difference between the two lies in who their primary beneficiaries are—the FAA on the side of the employer and class action suits on that of the employee.

8 *See*, Federal Arbitration Act, 9 U.S.C. § 1.

9 Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).

Before 1995, courts were unsure of how to interpret the phrase "involving commerce" in Section 2 of the FAA.[10] Consequently, industries pressured the courts to define what implications the phrase would have in relation to the FAA and its applications. The FAA was also ambiguous in other areas that have only been clarified in recent decades. For instance, it was only in 1984 with *Southland Corp. v. Keating* that it became clear that the FAA applied in state courts as well as in federal courts. Previously, the FAA was "by all accounts intended to be 'a procedural statute applicable only in the federal courts.'" [11] In the decades between the enactment of the FAA and the year 1984, the courts viewed arbitration as an alternative method of dispute resolution between businessmen, not between other parties involved in commerce such as consumers, employees, investors, and others unless these parties had agreed to arbitrate.[12] In 1967, however, the Court held that the FAA applies in diversity cases in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, implying that the FAA creates substantive law instead of regulating mere procedure.[13] Finally, in 1995, the Supreme Court held that the phrase "involving commerce" signaled the full exercise of Congress's power under the commerce clause.[14] In other words, the FAA applies to contracts affecting *all* commerce—not only those with interstate connections.

In some instances, state courts and legislatures have attempted to invalidate or restrict certain mandatory arbitration agreements, but the Supreme Court has consistently decided that the FAA overrules any state laws or regulations. The reasoning originates from

10 *See*, Federal Arbitration Act, 9 U.S.C. § 2.

11 *See*, Jack Wilson, *No-Class-Action Arbitration Clauses, State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QLR 737, 738 (2004).

12 *Id*. at 739.

13 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404-05 (1967).

14 Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995).

the Supremacy Clause of the Constitution.[15] Additionally, as the Court has noted, the FAA "was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate." [16] Section 2 compels courts to place arbitration agreements on equal footing with all other contracts. States thereby act unlawfully when they single out arbitration clauses with the purpose of treating them differently to other contracts. The Federal Arbitration Act itself does not contain an express preemption clause. However, the Court has held that, pursuant to implied preemption principles, the FAA supersedes state laws that "undermine the goals and policies of [the Act]." [17]

The Court has also determined that the FAA's "overarching purpose…is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." [18] This way, corporations may seek proper redress or resolve legal disputes more quickly and easily in an authorized setting. After all, arbitration takes an average of 475 days to reach a decision, while the traditional judicial forum might take anywhere from 2 to 3 years to reach a similar decision. [19]

In summary, the Federal Arbitration Act has three overarching purposes: 1) to grant legitimacy to contract law, 2) to streamline judicial proceedings, and 3) to offer a low-cost and time-efficient alternative to litigation for businesses.

15 JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESEARCH SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 5 (2017).

16 *See*, *Volt Info. Scis.*, 489 U.S. at 478.

17 *Id.* at 477.

18 *Id.* at 478.

19 David Sherwyn, J. Bruce Tracey, & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. JOURNAL OF LABOR AND EMPLOYMENT LAW 73, 85-89 (1999).

A. Class Action Suits in Employment Law

Why then were class action suits originally allowed in employment disputes? Justice Ginsberg enumerated and implied several reasons in her dissenting opinion in *Epic Systems Corp. v. Lewis*: [20]

1. Individual employee claims are small, "scarcely of a size warranting the expense of seeking redress alone;"

2. Employees can gain effective redress "by joining together with others similarly circumstanced;"

3. Employees may match the clout of employers in setting terms and conditions of employment, and

4. Judicial proceedings may be streamlined, lowering cost and time demands in litigation for individual employees.

Class action suits in employment law, then, were allowed for reasons that mirror those of the Federal Arbitration Act. It seems the difference is that class action suits serve the needs of the employee while the FAA protects the interests of the employer. Regardless of whether Congress meant for this application of the FAA to be biased, the judicial system is allowing it to take on that exact nature.

Outside of employment law, the Supreme Court ruled on *American Express Co. v. Italian Colors Restaurant*, a case regarding class action suits and the FAA within the context of a violation of antitrust laws. The class action plaintiffs' main assertion was that individual litigation, as required by their contracts with American Express, would cost employees far more money to prove their case than they could ever receive in damages. The Court acknowledged that the class action plaintiffs had no cost-effective remedy to American Express Company's alleged violation of the antitrust laws but held that an arbitration agreement that precluded class-wide proceedings

20 Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) (5-4 decision) (Ginsburg, R., dissenting).

was still enforceable. Their reasoning was that the FAA could only be overridden in the event of a "contrary congressional command."[21]

In recent years, employers have increasingly instituted class action waivers in their employment contracts to restrict employees' rights to bring a legal action.[22] Specifically, they have nestled an individual dispute resolution requirement into their arbitration clauses to effectively disregard the rights granted to employees in the National Labor Relations Act (the "NLRA") and take advantage of the coverage offered by the FAA. Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[23] Similarly, Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees in their exercise of the rights guaranteed in Section 7.[24] Unfortunately, the Supreme Court has validated employers' interferences with the right of employees to join in concerted judicial activities. The Court's recent decisions regarding the FAA—like *Epic Systems Corp. v. Lewis*—suggest that the American judicial system, when forced to choose between a human being and a corporate entity, will consistently side with the latter.

III. In the Context of Epic Systems Corp. v. Lewis

On May 21, 2018, the Supreme Court published a majority decision regarding the case *Epic Systems Corp. v. Lewis*. This was a consolidated case that also included *Ernst & Young v. Morris* and *National Labor Relations Board v. Murphy Oil USA, Inc*, all of which were

21 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

22 Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.

23 *See*, National Labor Relations Act, 29 U.S.C. § 7.

24 *See*, National Labor Relations Act, 29 U.S.C. § 8.

grappling with the discrepancies in the Federal Arbitration Act and the National Labor Relations Act. [25]

Epic Systems Corporation ("Epic") is a healthcare data management software company based in Wisconsin. Like other companies, Epic requires all of its employees to sign an arbitration agreement that effectively waives the employees' rights to participate in or benefit from any class, collective, or representative proceedings. This means that any legal dispute between an employee and the company must be resolved through individual arbitration. [26]

In February 2015, Jacob Lewis, a former employee at Epic, sued the corporation for denial of overtime wages in violation of the Fair Labor Standards Act of 1938. The issue was that Lewis, despite having signed the arbitration agreement previously mentioned, filed his suit in federal court individually and on behalf of a class of employees similarly affected. Epic reacted by citing the waiver clause of its arbitration agreement as evidence supporting its motion to dismiss Lewis' suit. The federal district court ruled that the waiver was unenforceable under Section 7 and Section 8 of the National Labor Relations Act. With the reasoning that "concerted activities" included class action suits, the federal district court denied Epic's motion to dismiss. However, Epic Systems Corporation appealed. The U.S. Court of Appeals for the Seventh Circuit upheld the decision of the lower court, adding that the class-action waiver in the arbitration agreement was unenforceable under the saving clause of the FAA as well. Epic Systems Corporation appealed yet again with a petition for certiorari to the Supreme Court of the United States. The Supreme Court issued a writ of certiorari and addressed *Epic Systems Corp. v. Lewis* in late 2017. [27]

Much of the *Epic Systems v. Lewis* case dealt with the interpretation of the FAA, being that the act serves as the basis for the absolute enforceability of arbitration agreements. As mentioned before, the Supreme Court noted in *American Express Company v. Italian*

25 Epic Systems Corp. v. Lewis, 138 S. Ct., 1612 (2018).

26 *See*, Recent Case, Epic Systems Corp. v. Lewis., *138 S. Ct. 1612 (2018)*, 132 Harv. L. Rev. 427 (2018).

27 *Id*.

Colors Restaurant that a "contrary congressional command" could override the enforcement of an arbitration agreement pursuant to the FAA. [28] *Epic Systems Corp. v. Lewis* essentially brought this exception into question and forced the court to decide if class-action suits were protected under the NLRA and as such were non-waivable under the FAA. [29]

The Supreme Court responded by reversing the lower courts' decision and upholding the validity of employment contracts that force employees to give up their right to collective litigation against their employer. Five justices argued that the express terms of the FAA should overcome the implied or subjective interpretation of the rights afforded to employees by the NLRA. [30] Additionally, they noted that the Supreme Court "had previously allowed for arbitration of statutory claims even when those other statutes expressly allowed for collective litigation." [31]

In dissent, Justice Ginsburg analyzed the situation within a historical context and argued that by upholding the validity of class-action waivers in arbitration agreements, the Supreme Court was essentially prioritizing the FAA in subordination of employee-protective labor legislation such as the NLRA and the Norris-LaGuardia Act. [32] These two pieces of legislation were originally enacted to "correct power imbalances between employers and employees" [33]. In her review of relevant case law, the FAA, and the NLRA, Justice Ginsburg concluded that nothing merited the dismissal of fundamental protections afforded to employees by the National Labor Relations Act.

Thus, the ruling on *Epic Systems Corp. v. Lewis* begs the question: is it just to allow arbitration agreements to restrict employees'

28 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

29 Epic Systems Corp. v. Lewis, 138 S. Ct., 1612 (2018).

30 *See*, Recent Case, *Epic Systems Corp. v. Lewis., 138 S. Ct. 1612 (2018)*, 132 HARV. L. REV. 427 (2018).

31 *Id*.

32 *Id*.

33 *Id*.

statutory rights with the sole purpose of achieving the FAA's underlying objective to streamline the judicial process?

In past cases, the Court has answered this question with a resounding "yes," repeatedly concluding that an arbitration can, in fact, restrict the enforcement of a right. In *Gilmer v. Interstate/Johnson Lane Corp.*, for example, the Age Discrimination in Employment Act ("ADEA") came into conflict with the Federal Arbitration Act, and the Court ruled that the claim alleging a violation of the ADEA could be subject to compulsory arbitration.[34] The Supreme Court held that an arbitration agreement could be upheld in a securities application. However, past cases like *Gilmer* differ from *Epic Systems Corp. v. Lewis* in material fact. Whereas *Gilmer v. Interstate/Johnson Lane Corp.* dealt with deciding what kinds of contracts were exempt from the Federal Arbitration Act, *Epic Systems* prioritized the issue that the consideration in the arbitration agreement eliminates both a judicial and arbitral forum for concerted activity, a right provided by the NLRA. This should be deemed illegal consideration. Additionally, without class action suits, these employees would be deprived of their right to seek redress because of the additional financial, time, and employment burden it would place on these plaintiffs.

In order to resolve the legality and ethics of using the Federal Arbitration Act to waive the right to collective legal action, we must explore two avenues of reasoning: 1) Do the rights in the Federal Arbitration Act preclude those of the National Labor Relations Act? and 2) Does public policy and the legal system mandate the enforceability of arbitration agreements in the context of employment law?

A. Do the rights in the Federal Arbitration Act preclude those of the National Labor Relations Act?

This question deals specifically with the *American Express Company v. Italian Colors Restaurant* ruling that allows the enforcement of an arbitration agreement to be overridden by a "contrary

34 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

congressional command,"[35] which, in this article, we will narrow to be the NLRA. The conflict between the FAA and the rights afforded by the NLRA should push either the judicial system or the legislative system to act in support of class action rights. As mentioned previously, the NLRA forbids employers from interfering in any way with their employees' exercise of rights, individually and collectively, that are within the scope of the NLRA. According to a majority of the Supreme Court, the NLRA is not an exception to the FAA on the basis of a "contrary congressional command."[36]

The principal argument is that the NLRA fails to expressly indicate class action suits as a right included under "concerted activities."[37] However, precedent indicates that express terms are unnecessary. In *Shearson/American Express Inc. v. McMahon*, the Court established a test to determine whether any congressional command is "deducible from…text or legislative history" or from an inherent conflict between arbitration and the statute's underlying purposes.[38] This well-established test strongly suggests that implied terms in a congressional command are sufficient to infer the existence of those terms.

Justice Gorsuch argues that even while examining the implied rights of the NLRA, he found no evidence that the NLRA evinces congressional intent to bar application of the FAA. He compared the NLRA to other statutes with more express rights in favor of class action suits and "observed that it would be anachronistic to construe Section 7 to confer class action rights, considering that Federal Rule of Civil Procedure 23 did not exist until 30 years after the NLRA was enacted"[39] (HLR). The majority opinion justifies its ruling

35 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

36 Epic Systems Corp. v. Lewis, 138 S. Ct., 1612 (2018).

37 *See*, National Labor Relations Act, 29 U.S.C. § 7.

38 *Arbitration and Class Actions - National Labor Relations Act - District Court Enforces Class Action Waiver in Employment Arbitration Agreement - Morvant v. P.F. Chang's China Bistro, Inc*., 126 HARV. L. REV. 1122, 1123 (2013).

39 *See*, Recent Case, Epic Systems Corp. v. Lewis., *138 S. Ct. 1612 (2018)*, 132 HARV. L. REV. 427 (2018).

based on a strict, narrow interpretation of law. While a majority of the Supreme Court deemed this interpretation as legally sound, a minority dissented. The dissenting opinion evinced a broader interpretation of the NLRA to uncover its implied meaning. Justice Ginsburg interpreted the NLRA in its historical context, concluding that its purpose was "to place employers and employees on a more equal footing."[40] In order to effectively negotiate the terms of employment, employees must have the capacity to match the clout of their employers—something that can only be achieved through collective means.

The enormous power that employers wield in drafting employment contracts should not excuse them from observing relevant statutes such as the NLRA. The problem of unbalanced power exists in all legal fields and is one that the courts have anxiously strived to remedy. For example, courts have historically determined that we, as people, deserve to be represented in court regardless of our financial capabilities. Although the scope of this paper falls squarely within civil law, an example in criminal law may help to illustrate the historical attitude of the legal system. It is clear that an individual would not have the personal clout to defend him- or herself against the prosecutorial power of the United States of America. As such, the Sixth Amendment has been interpreted to provide an indicted citizen with a defense attorney regardless of whether he or she can afford it. This equality of representation is one of the central premises upon which our legal system is founded.

In consumer law, we see a similar conflict occurring in arbitration agreements and class action waivers between corporations and consumers. Because companies generally draft contracts of

40 Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) (5-4 decision) (Ginsburg, R., dissenting).

adhesion[41] in their favor, they often include individual arbitration clauses that either escape the consumer's awareness or force the consumer to agree to it. After all, these companies understand that arbitration has "traditionally been more beneficial to the corporate defendants."[42] Litigation in a judicial forum can already be especially costly for the individual plaintiff, but these costs can become even more onerous when the plaintiff is an individual consumer seeking redress from a large corporation through arbitration. The high costs of seeking redress would most certainly outweigh the potential damages or relief to be recovered through legal action. Although these employment contracts are not necessarily categorized as contracts of adhesion, the central concern still applies: the costs for an individual plaintiff in either a judicial forum or arbitration would be onerous, especially against a large corporation.

If the purpose of the National Labor Relations Act is "to place employers and employees on a more equal footing," then corporations have consistently flouted employees' rights by using the lack of express terms in their arbitration clauses as their main defense.[43] This loophole in the Federal Arbitration Act, which corporations have abused time and time again, is a serious threat to the NLRA's congressional command.

The Federal Arbitration Act demands that courts subject arbitration agreements to the same laws that govern contract law. If arbitrations are contrary to an existing statute, then the consideration of

41 An adhesion contract (also called a "standard form contract" or a "boilerplate contract") is a contract drafted by one party (usually a business with stronger bargaining power) and signed by another party (usually one with weaker bargaining power, usually a consumer in need of goods or services). The second party typically does not have the power to negotiate or modify the terms of the contract. Adhesion contracts are commonly used for matters involving insurance, leases, deeds, mortgages, automobile purchases, and other forms of consumer credit. CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhe-sion) (last visited Jan. 28, 2020).

42 Sarah Clasby Engel & Sherry Tropin, Class Action Arbitration: A Plaintiff's Perspective, 5 FIU L. REV. 145 (2009).

43 Epic Systems Corp. v. Lewis, 138 S. Ct., 1612 (2018).

the arbitration agreement is illegal and deemed—not only unconscionable as other courts have decided—but void or unenforceable. Contract law stipulates, "Even where such nullity is not specifically directed by the legislature, *public policy is generally thought to require it*, either to punish lawbreakers by withholding societal assistance from an illegal transaction, or *to maintain the integrity of the judicial process*." [44]

As such, if the judicial system fails to reconcile the FAA with the NLRA for its lack of express rights, the legislative system must then uphold employees' judicial rights by express congressional command.

B. Does public policy and the legal system mandate the enforceability of arbitration agreements in the context of employment law?

Public policy supports the substantive right to class action suits, so the legal system must support public policy because it affects nearly all aspects of public and private life. It "importantly shapes the responses to public risks…which jeopardize the welfare of the community as a whole. The legal system also shapes the social, political, and economic environment in which public risks arise and are responded to." [45] Several possible risks of deeming individual arbitration agreements in employment contracts as unenforceable have been outlined in past case decisions and current legal dialogue. Courts and legal professionals are concerned that doing so might undermine contract law, increase court traffic, or encourage more employee lawsuits.

However, in the matter of this claim undermining contract law, this article does not support a broad rejection of the Federal Arbitration Act but rather a firm rejection of questionable contract practices.

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44 *See*, *Validity of Contracts Which Violate Regulatory Statutes*, 50 Yale L.J. 1108 (1941). ("Even where such nullity is not specifically directed by the legislature, *public policy is generally thought to require it*, either to punish lawbreakers by withholding societal assistance from an illegal transaction, or *to maintain the integrity of the judicial process*." (emphasis added))

45 Geoffrey C Hazard. *The Role of the Legal System in Responses to Public Risk*. *Daedalus*, vol. 119, no. 4, 1990, pp. 229–234. *JSTOR*, www.jstor.org/stable/20025347. Accessed 28 Jan. 2020.

In *Shotts v. OP Winter Haven, Inc.*, the Supreme Court of Florida asserts, "With respect to which contract defenses...constitute 'generally applicable contract defenses' for purposes of section 2 [of the FAA], we conclude that public policy clearly is such a defense, for if an arbitration agreement violates public policy, no valid agreement exists." [46] *Global Travel Marketing, Inc. v. Shea* emphasizes the same principle: "No valid agreement exists if the arbitration clause is unenforceable on public policy grounds." [47] The Supreme Court of the United States itself explained in *Doctor's Associates, Inc. v. Casarotto* that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the Federal Arbitration Act]."[48] Considering the purpose of the NLRA, the Court, for lack of legal contract consideration, cannot possibly enforce arbitration agreements within employment contracts. Upholding their enforceability would actually be undermining public policy and, as a result, contract law.

The risk of possible increase in court traffic is valid but not as threatening as generally believed. Class action suits help fulfill the main purpose of the Federal Arbitration Act, which is "to streamline judicial proceedings." [49] The consolidation of these claims into class action suits allows for efficient class-wide redress in terms of time and money. Though the allowance of class action suits in employment law may increase court traffic, lawmakers and judges' more pressing concern should be the heavy decrease in legal claims brought against companies by employees. This decrease does not act as evidence that companies are improving corporate governance, but rather indicates that employees are unable to afford the costs of pursuing individual

46 Shotts v. OP Winter Haven, Inc., 86 So.3d 456 (2012).

47 Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392 (2005).

48 Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).

49 Sarah Clasby Engel & Sherry Tropin, Class Action Arbitration: A Plaintiff's Perspective, 5 FIU L. Rev. 145 (2009).

arbitration claims, given that such costs far outweigh the potential rewards that employees could receive from damages.[50]

Some may argue that the number of legal claims decreased because most of them were frivolous to begin with. This argument, though possible in a minority of cases, is overall specious. Indeed, some corporations worry that if they were to refrain from enforcing arbitration agreements, they would encourage more employees to bring lawsuits against them. But these corporations must realize that although class action suits would make judicial proceedings less costly for the individual, these costs are not insignificant. Enacting legal claims might even cause conflict and tension within the workplace if plaintiff-employees still work for the employer in violation. An individual would only feel the need to launch a class-wide complaint if employers actually violated the law, and did so in a fashion that affected more than a handful of employees. To offset possible frivolous cases, the corporation is perfectly justified in including an attorney fee provision clause in their employment contracts.

Additionally, proponents of mandatory arbitration agreements may reasonably believe that class action suits are an immense expense and detriment to firm cash flow. However, they are missing the bigger picture. As legislative acts, such as the Sarbanes-Oxley Act of 2002,[51] mandate corporate governance, we see that enacted laws must be slowly moving towards increasing the responsibility of businesses and employers. If a firm truly wants long-term cash flow and high firm value, would it not want to have the foresight to incorporate this attitude and firm culture of accountability sooner rather than later? Part of this requirement is providing an avenue for addressing mistreatment of employees that is equitable to both parties. In the long run, firm managers and investors will profit from learning how to better manage and be accountable to employees.

Thus, the risks of upholding the right to collective legal action over the enforceability of arbitration agreements can be mitigated by simple measures. On the other hand, the risk of enforcing class

50 *See*, Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 695 (2018).

51 *See*, Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201.

action waivers certainly jeopardizes the welfare of the community. Already, it has quashed the ability of employees to seek legal redress for violations of their rights, which in and of itself is a violation of employees' ethical rights.

In addition to this, mandatory arbitration clauses have also prevented employees from seeking redress when they have experienced sexual harassment at their jobs. In a letter sent to the House of Representatives and the Senate, the attorney generals of every state, the District of Columbia, and the U.S. territories admonished, "The secrecy requirements of arbitration clauses…disserve the public interest by keeping both the harassment complaints and any settlements confidential ...This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief." [52]Essentially, these attorney generals called for legislation to exempt sexual harassment victims from mandatory arbitration clauses in employment contracts. Silencing claims of mistreatment is a disservice to not only public interest, but to business interest as well.

Given the recent decision in *Epic Systems Corp. v. Lewis*, the Supreme Court is unfortunately keener on enforcing imbalance in favor of corporations rather than reprimanding them for their gross disregard for public policy and business ethics. Clearly, the financial well-being of a corporation is vital to the lifeblood of a nation. Corporations are entities that have been and will continue being protected by the judicial system—as they should be. However, these companies still must adhere to their duties to public policy and ethical behavior. If businesses fail to follow regulations imposed upon them by labor law, employees must have some method available to them for seeking equitable redress that is financially feasible.

Since public policy mandates the right of employees to seek judicial redress, either the judicial system or the legislative system must move forward to uphold this right by either overturning the precedent set by *Epic Systems* or by passing a legislative act.

52 Letter from National Association of Attorneys General to Congressional Leadership, The House of Representatives (Feb. 12, 2018), https://www.naag.org/assets/redesign/files/sign-on-letter/Final%20Letter%20-%20NAAG%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf.

As we prepare to take the next step, let us look again at the two questions we considered earlier: 1) Do the rights in the Federal Arbitration Act preclude those of the National Labor Relations Act? And 2) Does public policy and the legal system mandate the enforceability of arbitration agreements in the context of employment law?

Justice Ginsburg poses a question in her dissenting opinion: "Does the Federal Arbitration Act permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act 'to engage in…concerted activities' for their 'mutual aid or protection'?" Similar to the answer to the question posed by Justice Ginsburg, the answers to both of these questions "should be a resounding 'No.'" [53]

IV. Potential Consequences

It is beyond the scope of this article to predict what the outcome would have been for *Epic Systems Corp. v. Lewis* had the Court decided to allow a class action suit to form and press charges against Epic. However, such a decision would have at least enabled the judicial system to impart a more equitable result for the parties represented in the case.

At the moment, the Supreme Court's ruling has effectively silenced employees' concerns. Empirical evidence shows that only a fraction of employment claims is actually filed in arbitration.[54]

Furthermore, Reuters suggests that the effects of the Court's decision extend beyond legal implications[55] Shareholders value corporate governance; when they invest capital in a firm, they are also placing trust in that firm's corporate culture. Mandatory arbitration

53 Epic Systems Corp. v. Lewis, 138 S. Ct., 1612 (2018).

54 Estlund, *supra* note 51, at 689-700.

55 Alison Frankel, *When Corporations Silence Employees Via Arbitration, Shareholders Lose*,
Reuters News, Feb. 18, 2018, https://www.reuters.com/article/legal-us-otc-arbitration/when-corporations-silence-employees-via-arbitration-shareholders-lose-idUSKCN1FX2TH.

agreements silence employees and prevent investors from obtaining a crucial source of private information regarding any alleged mistreatment of employees that could be part of that corporate culture. Information is vital in semi-efficient markets such as those in the United States, and the lack thereof could not only slow efficiency of financial markets but also negatively affect shareholder wealth.

It follows, then, that the opposite of enforcing mandatory arbitration agreements— allowing employees the forum of judicial class-action litigation—would actually serve to increase the value of the firm and maximize shareholder wealth, which is the principal purpose of any firm or manager.[56] More employee information enables investors to more accurately gauge firm value and make necessary changes. Whether the firm is publicly or privately traded, investors and managers benefit from this greater exchange of information—especially if that information will cause a significant adjustment of expectations.

If employees' claims are not barred from class action proceedings, the number of employee claims would not magically increase but the number formally filed certainly would. Employers would be held more accountable to responsible and ethical corporate governance.

To be fair, employees do have options other than litigation to effect change within their employer. They may complain to the Department of Labor—known as "whistleblowing"—and have those officials investigate the company. However, this begs the question: is the judicial system really working at its best if whistleblowing is the only way to seek proper redress? Another option lies entirely in the hands of lawmakers; the legislature may pass new bills outlawing class action waivers to expressly make them contrary to congressional command. In 2017, lawmakers proposed bills doing exactly that with the Arbitration Fairness Act of 2017 and the Restoring Statutory Rights and Interest of the States Act of 2017. Unfortunately, little progress or movement has been observed since.

56 Richard M. Frankel, S.P. Kothari & Luo Zuo, *Economics of Accounting Earnings*, Dec. 18, 2019, http://dx.doi.org/10.2139/ssrn.3165085/.

V. Conclusion

The very purpose of the Federal Arbitration Act is subservient—legally and ethically—to that of the National Labor Relations Act. Even so, the Supreme Court has upheld arbitration agreements that have gone as far as violating the implied purpose of congressional acts that protect the rights of employees—specifically, the right to seek judicial redress within their financial means. This right is mandated by both precedent and public policy. Upholding this right would not only maintain the integrity of the legal system but also benefit the very corporations that fight against it. Corporate governance would be enforced more heavily, thus maximizing long-term shareholder wealth. The economy as a whole would become more efficient from the increase in transparent information if the legislature or judicial system held all corporations to this same standard.

And what if the majority opinion in *Epic Systems Corp. v. Lewis* really is the most legally sound? Then, all the more reason that the legislature must remedy the loophole that businesses are increasingly abusing to quash the substantive rights of their employees. The ethical and public policy-related discussions of this article still hold.

We turn back to the legal and governmental system. If the Supreme Court does not overturn its decision in *Epic Systems Corp. v. Lewis* in subsequent cases, the immediate solution to this gross injustice to the interests and rights of employees is clear. The legislature ought to realign the goals of the Federal Arbitration Act with those of the National Labor Relations Act and enact an amendment or a clarifying congressional act to the Federal Arbitration Act, expressly deeming class action waivers in arbitration agreements as unenforceable.